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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1354

CLUB RECREATION AND PLEASURE, an Oregon non-profit corporation; SWAN MANAGEMENT CO., an Oregon corporation, and JOHN R. TIDYMAN,

Petitioners,

v.

THE STATE OF ORECON, ex rel HARL HAAS, District Attorney for Multnomah County, State of Oregon,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Harl H. Haas, District Attorney of Multnomah County, Oregon, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion

of the Court of Appeals of the State of Oregon in this case. That opinion is reported at 41 Or App 557 and at 599 P2d 1194.

JURISDICTION

The Court of Appeals of the State of Oregon filed its opinion in the above-entitled cause on August 20, 1979, and denied a rehearing on the matter on September 20, 1979. The Supreme Court of the State of Oregon denied the petition for review on November 20, 1979. On November 28, 1979, the Court of Appeals issued the judgment and mandate and allowed costs in the sum of ninety ($90) dollars to respondent. The clerk of the court had erroneously excluded the respondent's requested cost bill on the basis of untimely filing. The Court of Appeals issued an amended judgment and mandate on December 4, 1979. It increased the costs

to include those previously excluded; it did not alter the court's original opinion on the merits.

The petition for writ of certiorari was mailed by petitioners on February 29, 1980. The period for applying for a writ of certiorari had not been extended by a Justice of this Court (28 U.S.C. §2101(c) and Rule 22 of this Court). It appears that petitioner's application for a writ of certiorari is out of time and this Court lacks jurisdiction to consider the same (28 U.S.C. §2101(c)).

Petitioners invoke jurisdiction on the basis of 28 U.S.C. §1254(1). That section does not apply to the review of State court decisions.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitutional rights attendant to a criminal prosecution apply to the enforcement of the

civil nuisance abatement statute, ORS 465.110 -465.180, to abate a public nuisance, which may also constitute a violation of the criminal law?

2. Whether the provisions of ORS 465.110, et. seq., allowing the closure of the premises for a period of one year and allowing the sale of the personal property located on the premises, with the proceeds being returned to the owner after the deduction of costs, constitute an unconstitutional taking of the petitioner's property?

3. Whether the requirement of ORS 465.155 that the owner of the premises, upon which a nuisance has been shown to exist, show that with reasonable care and diligence he could not have known of the illegal use in order to avoid the abatement decree is a denial of the owner's due process rights?

4. Whether the terms "lewdness" and "assignation" as used with the term "prostitution" in the abatement statute are unconstitutionally vague?

5. a. Whether nude slow dancing in a commercial establishment by a hostess and a patron in a private room is symbolic speech?

b. Whether such activity if symbolic speech and as an integral part of the crime of prostitution is subject to State regulation?

c. Whether such activity if symbolic speech and not part of illegal conduct is subject to State regulation?

6. Whether the abatement and enjoining of nude slow dancing with subsequent agreements to engage in sexual activity for a fee in a commercial establishment, open to public patronage and in a separate room infringes on the participants' constitutional right of privacy?

7. Whether the provisions of the nuisance abatement statute which allow the abatement of the nuisance and injunctive relief to prevent its reoccurrence deprives the members of Club Recreation and Pleasure of their constitutional right of freedom of association?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I.

2. United States Constitution, Amendment V.

3. United States Constitution, Amendment XIV, §1.

4. Oregon Revised Statutes, §465.110 et. seq. (Set out in Appendix A)

STATEMENT OF CASE

The suit at issue arose out of the operation of a business known as the Pleasure Palace in Multnomah County, Oregon. On five occasions between

September 28, 1977, and December 20, 1977, undercover police officers for the City of Portland entered the premises and made arrests for prostitution. (Tr I, 34,35, 46, 53; Trial Ex. 2, 3). The scenario was basically the same for each incident. The officer would enter the premises and be greeted by scantily clad female employees. (Tr I, 36). He would select a program which included a shower, nude slow dancing and a sauna. (Tr I, 86, 94). In addition to paying for the program, he would pay one dollar for membership in Club Recreation and Pleasure. (Tr I, 36). He would be shown to a separate room where he would be joined later by the employee of his choice. Both would disrobe completely. (Tr I, 38). After some preliminary dancing or right away, there would be a discussion of other sexual conduct in return for an additional fee. (Tr I,

38, 48, 56). On the pretext of getting the money, other officers would be signalled and the employee arrested. (Tr I, 38-39).

Pursuant to ORS 465.110, the respondent herein filed a civil suit to abate the nuisance and to enjoin the petitioners herein, as the owner, lessee and operator of the premises, from such future conduct. The parties were served through standard civil process. A hearing was set on the preliminary injunction but at its conclusion by stipulation the court ruled on the merits of the case.

The hearing was tried to the court as the proceeding was in equity. Evidence was received of a commercial advertisement for Pleasure Palace explicitly depicting sexual contact. (Trial Ex 1, Tr I, 32-33). Neighbors who had lived in the area for a number of years testified

that the common fame of the Pleasure Palace was that it was run for purposes of prostitution. (Tr I, 21, 25, 27, 29). Additionally police officers testified about the arrests which had been made.

The trial court found in its written findings of fact that the premises had been established, maintained, used and occupied for lewdness, assignation and prostitution. The trial court ordered the nuisance abated and enjoined permanently each of the petitioners herein from "conducting, maintaining, using or occupying, or in any way permitting the use or occupancy of the premises or any other premises in Multnomah County for prostitution." The building was closed for all purposes for a period of one year. The personal property was ordered seized and sold in the manner as for chattels under execution.

The Court of Appeals of Oregon affirmed the order and decree of the trial court by opinion filed on August 20, 1979. The Supreme Court of Oregon denied the petition for review on November 20, 1979.

REASONS FOR DENYING THE WRIT

1. PETITIONERS' RELIANCE ON 28 USC 1254(1) AS GROUNDS FOR JURISDICTION IS INAPPROPRIATE. THE PETITION FOR WRIT OF CERTIORARI WAS NOT FILED IN TIME

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1). That section applies to review by this Court of cases from the federal courts of appeal. It does not apply to the review of cases from State courts.

28 U.S.C. 2101(c) requires that a writ of certiorari to review a judgment or decree in a civil action, suit or proceeding shall be applied for within ninety days from entry of the judgment or decree unless an extension has been

granted. The Court of Appeals of Oregon filed its opinion on August 20, 1979. The Supreme Court of Oregon denied the petition for review on November 20, 1979. The time period for filing the petition for writ would commence on November 20, 1979. American Railway Express Co. v. Levee, 263 US 19, 21, 44 S Ct 11, 68 L Ed 140 (1923). At that point the order was final in that the issues had been fully adjudicated and were not subject to further review in the State courts. Department of Banking v. Pink, 317 US 264, 63 S Ct 233, 87 L Ed 254 (1942). The amended judgment and mandate dealt only with costs and not with the merits which are sought to be reviewed. Petitioners' mailing of the application for a writ on February 29, 1980, was beyond the ninety day period.

2. THE PETITION FOR WRIT OF CERTIORARI IS DIRECTED TO THE WRONG COURT

28 USC §1257 provides that this Court

may review judgments and decrees rendered by the highest court of a state in which a decision could be had. The Court of Appeals of Oregon rendered its opinion on August 20, 1979. The Supreme Court denied the petition for review. The petition for writ of certiorari should be directed to the Court of Appeals of Oregon. See e.g., Faretta v. California, 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562 (1975).

3. A CIVIL PROCEEDING UNDER THE NUISANCE ABATEMENT STATUTE, ORS 465.110, et. seq., TO PREVENT THE CONTINUANCE OF A PUBLIC NUISANCE WHICH MAY ALSO CONSTITUTE A CRIME IS AN EQUITABLE PROCEEDING AND DEFENDANTS ARE NOT ENTITLED TO THE RIGHTS ATTENDANT TO A CRIMINAL PROSECUTION.

Equity has traditionally had the power to abate nuisances. By statute these equitable powers have been extended to provide injunctive relief against public nuisances. Defendants do not have a right to a jury trial in equitable proceedings. People ex rel Lemon v. Elmore,

256 NY 489, 493, 177 NE 14, 75 ALR 1292 (1931) (abatement of a house of prostitution). See, Annot., 75 ALR 1298 (1931).

Further, the proceedings are not penal in nature. The sole purpose of the statutory scheme is to prevent the continuance or future existence of a public nuisance. All procedures are handled through standard civil process. There is no possibility of incarceration, unless the court order is violated. Nothing is entered in a criminal record. There is no fine. At most the most the defendant is required to pay the costs of the proceeding and post a bond for the release of the property from the one-year closure, upon the condition that that nuisance not be reinstated.

Injunctive relief is the only effective remedy in situations like this where the individual actually involved in

the criminal activity can easily be fired and replaced. Those with property interests continue to reap monetary benefit to the detriment of the community.

4. THE PROVISIONS OF ORS 465.110 et. seq., ALLOWING THE CLOSURE OF THE PREMISES AND THE SALE OF THE PERSONAL PROPERTY DO NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING OF THE DEFENDANT'S PROPERTY

The state has the authority to enact laws regulating the health, safety, morals and general welfare. Near v. Minnesota, 283 US 697, 707, 51 S Ct 625, 75 L Ed 1357 (1931). Maintaining a house of prostitution is a nuisance per se by statute and case law. ORS 465.110, Blagen v. Smith, 34 Or 394, 404, 56 P 292 (1899), Raleigh v. United States, 351 A2d 510 (DC Cir 1976). The state has a substantial interest in abating public nuisances. People ex rel Hicks v. "Sarong Gals", 117 Cal Reptr 24, 29, 42 Cal App 3d 556 (1974).

A number of safeguards have been incorporated to minimize the interference with the owner's property rights. ORS 465.150 provides that an abatement order shall require that the premises, determined to be a nuisance, be closed for all purposes for one year unless sooner released, and that personal property used in maintaining the nuisance shall be sold. The owners of the property, real or personal, can seek cancellation of the order as to him upon a showing "that with reasonable care and diligence he could not have known of the illegal use." ORS 465.155. Even if the owner or lessee was aware of the illegal conduct, the property may be released to him upon the payment of costs and filing of a bond with the condition that the nuisance not be established for one year. ORS 465.180. The proceeds from the sale of the personal property

shall be paid to the owner, after deducting the cost of the suit and sale. ORS 465.170

This regulation of the owner's use of property for illegal purposes is a reasonable exercise of the state's police power. People ex rel Difanis v. Futia, 65 Ill App 3d 1027, 383 NE2d 763 (1978) (injunction of a massage parlor as a public nuisance). See also, Annot., 75 ALR 1298 at 1302.

5. THE REQUIREMENT OF ORS 465.155 THAT THE OWNER OF PREMISES, UPON WHICH A NUISANCE HAS BEEN SHOWN TO EXIST, SHOW THAT WITH REASONABLE CARE AND DILIGENCE HE COULD NOT HAVE KNOWN OF THE ILLEGAL USE IN ORDER TO AVOID THE ABATEMENT DECREE, IS NOT A DENIAL OF THE OWNER'S DUE PROCESS RIGHTS.

In addition to the statutory provisions discussed in section 4 supra, further procedural safeguards protect the owner's interests. First, no preliminary injunction is allowed until there has been service of notice on the owner and a hearing.

ORS 465.130(1) Second, the permanent injunction and closure of the property for one year may be ordered only after a trial on the merits. ORS 465.150. At either stage of the proceedings, the initial burden is on the State of Oregon to establish that the nuisance exists. In this case, there was no injunction of any kind until after a trial on the merits.

The statutory provisions of ORS 465.110 et. seq. strike an equitable balance between the community's right to be protected from such nuisances and the owner's right to use his premises for lawful purposes. As noted by this Court, "the locus of the burden of persuasion [outside of the criminal law] is normally not an issue of federal constitutional moment." Lavine v. Milne, 424 US 577, 585, 96 S Ct 1010, 47 L Ed 2d 249 (1976).

6. THE TERMS "LEWDNESS, ASSIGNATION AND PROSTITUTION" AS USED IN THE ABATEMENT STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE.

The terms used have common meanings and reasonably apprise the Petitioners of which conduct is prohibited and which is allowed. Lewdness is a common law offense and defined as "'[g]ross and wanton indecency in sexual relations . . . so notorious as to tend to corrupt community's morals.' Blacks Law Dictionary (Rev. 4th Ed. 1968)." Hensley v. City of Norfolk, 216 Va 369, 218 SE2d 735, 740 (1975) (conviction for maintaining a bawdy house). Assignation is defined as "an appointment of time and place . . . used chiefly of love interviews, and now commonly used in a bad sense." Webster's New International Dictionary 166 (2d Ed. 1940). These words afford a reasonable degree of common understanding and are not unconstitutionally vague. State ex rel Webster v.

Daughtery, 530 SW2d 81 (Ct App Tenn 1975) (assignation and prostitution not vague); Hensley v. City of Norfolk, supra (lewdness, assignation, prostitution and illicit sexual intercourse not vague); Palm Gardens, Inc. v. OLCC, 15 Or App 20, 31, 514 P2d 888 (1973) (lewd not vague).

Vagueness must be examined in light of the facts at issue unless a First Amendment issue is involved. United States v. Powell, 423 US 87, 92, 96 S Ct 316, 46 L Ed 2d 228 (1975). The activities complained of nude, slow dancing for a fee in a commercial establishment with subsequent offers and agreements for sexual contact for a fee, clearly fall within the commercialized sexual activity encompassed by the statute. There is no uncertainty for those wishing to avoid its reach.

Petitioners do not challenge the definition of prostitution but challenge its omission from a portion of the statute.

That issue was raised and decided below as a matter of statutory construction, not as an issue of vagueness.

7. COMMERCIAL NUDE SLOW DANCING COUPLED WITH PROSTITUTION IS CONDUCT AND NOT SYMBOLIC SPEECH ENTITLED TO FIRST AMENDMENT PROTECTIONS.

The Court has recognized that "bar-room" nude dancing might be entitled to First and Fourteenth Amendment protection under some circumstances. Doran v. Salem Inn, Inc., 422 US 922, 932, 95 S Ct 2561, 45 L Ed 2d 648 (1975). The activities at issue are even further removed from any expressive form. There is no audience. The patron pays a fee to have physical contact with the employee while they are dancing in the nude. No element of communication or expression is involved. These activities do not fall within the First Amendement protections.

Assuming that such activity is protected speech, it is subject to regulation

when the expression consists in part of conduct directed to accomplish an illegal act. California v. LaRue, 409 US 109, 116, 93 S Ct 390, 34 L Ed 2d 342 (1972). Each arrest in this case was made for prostitution, i.e., an offer or agreement to engage in sexual contact or conduct for a fee. Any symbolic speech associated with these illegal acts is subject to state regulation or prohibition.

Assuming that no illegal conduct had accompanied this dancing, such activity would still be subject to state regulation. These activites are clearly not the constitutional equivalent of a theater performance. California v. LaRue, supra at 118. As noted above, the state has a significant interest in abating public nuisances. Further, a number of procedural safeguards minimize the effect on those wishing to use their property for

lawful purposes. The state interest clearly outweighs the petitioners' right to present non-lewd dancing. See, People ex rel Hicks v. "Sarong Gals", 117 Cal Reptr 24, 29, 42 Cal App 3d 556 (1974).

8. THE ABATEMENT STATUTES DO NOT INFRINGE ON THE PARTICIPANTS' RIGHT TO PRIVACY

The activites at issue took place in a commercial establishment open to public patronage. Dancing was done in a separate room with only the patron and employee present. The constitutional concept of privacy does not encompass this activity. See, Paris Adult Theatre I v. Slaton, 413 US 49, 65-66, 93 S Ct 2628. 37 L Ed 2d 446 (1973); Caesar's Health Club v. St. Louis Cty., 565 SW2d 783, 787-88 (Mo App 1978), cert den 439 US 955 (1978). To adopt petitioners' position would legalize all activities which occur behind closed doors.

9. THE ABATEMENT STATUTES DO NOT DEPRIVE PETITIONERS OF THEIR RIGHT OF ASSOCIATION

The statutory scheme prohibits the maintenance of a public nuisance. It does not prohibit membership in Club Recreation and Pleasure. The right to associate with others is not affected.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

May 1980

ABATEMENT OF PLACES OF PROSTITUTION OR UNLAWFUL ABORTIONS

465.110 PLACES USED FOR PROSTITUTION OR UNLAWFUL ABORTIONS DECLARED A NUISANCE; ABATEMENT. Whoever establishes or maintains any place used for the purpose of lewdness, assignation or prostitution or any other immoral act, or a place where pregnancies are terminated in violation of ORS 435.415, 435.425 and 435.455 is guilty of maintaining a nuisance. The place where such lewdness, assignation or termination of pregnancies is conducted or carried on and the contents of such premises are declared a nuisance and shall be enjoined and abated as provided in ORS 465.120 to 465.180.

465.120 SUIT TO ENJOIN NUISANCE. Whenever a nuisance exists under ORS 465.110, the district attorney shall or any taxpayer of the county may maintain a suit in equity in the name of the state to perpetually enjoin such nuisance, the persons

conducting or maintaining the same, and the owner, lessee or agent of the building or ground upon which the nuisance exists.

465.130 PRELIMINARY INJUNCTION; ISSUANCE; CONTINUANCE. (1) No preliminary injunction or restraining order shall issue without notice, but when such order is prayed for in the complaint and it appears from the facts shown by affidavit or by the complaint that a nuisance exists and that the public interest and good morals require its prompt abatement, the court or judge thereof shall make an order fixing the time for the hearing of such application not less than three nor more than five days after service of notice on the defendant. Upon such hearing the court shall inquire into and dispose of the matter and for that purpose may receive evidence in the form of affidavits, oral or documentary testimony.

(2) If it appears to the satisfaction of the court that such nuisance exists and that public morals and good order require that it be promptly abated, the court shall issue the preliminary injunction as prayed for.

(3) No continuance of a hearing on such application shall be granted at the instance of a defendant except for good cause shown, and in no event for a longer period than 10 days in the aggregate unless on consideration the restraining order issue as a matter or course, which order shall be enforced pending the hearing.

(4) When an injunction has been granted, it shall be binding on the defendant throughout the judicial district in which it was issued.

465.140 PROMPT TRIAL; EVIDENCE; WITHDRAWAL AND SUBSTITUTION OF PROSECUTING WITNESS; COSTS. (1) A suit under ORS

465.120 shall be promptly tried.

(2) In such suit common fame shall be competent evidence in support of the complaint.

(3) If the complaint is filed by a taxpayer, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney setting forth the reasons why the suit should be dismissed, and the dismissal approved by the district attorney in writing or in open court. If the court is of the opinion that the suit ought not to be dismissed, he may direct the district attorney in writing to prosecute said suit to judgment.

(4) If the suit is continued more than one term of court, any citizen of the county or the district attorney may be substituted for the complaining party, and prosecute said suit to judgment.

(5) If the suit is brought by a taxpayer and the court finds that there was

no reasonable ground or cause for said suit, the costs may be taxed to such taxpayer.

465.150 ORDER OF ABATEMENT; CLOSURE; SALE OF CONTENTS; ENTERING PROHIBITED. (1) If the existence of the nuisance is established in a suit under ORS 465.120, an order of abatement shall be entered as a part of the judgment in the case. This order shall direct:

(a) Removal from the building or place of all fixtures, furniture, instruments, appliances, medicines, drugs, contents or movable property used in conducting the nuisance.

(b) Sale of the property removed in the manner provided for the sale of chattels under execution.

(c) The effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless sooner released.

(2) No person shall break and enter or use a building, erection or place so directed to be closed.

(3) For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property for execution. For closing the premises and keeping them closed a reasonable sum shall be allowed by the courts.

465.155 APPEARANCE BY OWNER OF CLOSED PROPERTY FOR RELIEF FROM CLOSURE ORDER. The owner of any real or personal property so closed or restrained, or to be closed or restrained, may appear at any time between the filing of the complaint and the trial and show cause why the court should cancel or refrain from issuing any decree or orders as against him. Such owner, in order to obtain such relief, must prove to the satisfaction of the court that he is the

lawful owner of said property and, further, that with reasonable care and diligence he could not have known of the illegal use of his property.

465.160 SUMMARY TRIAL FOR VIOLATION OF INJUNCTION. Violation of any injunction granted under ORS 465.110 to 465.180 is a contempt and the court, or in vacation, a judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of witnesses.

465.170 APPLICATION OF PROCEEDS OF SALE OF PERSONAL PROPERTY. The proceeds

of the sale of the personal property, as provided in ORS 465.150 shall be applied in payment of the costs of the suit and abatement. The balance, if any, shall be paid to the defendant.

465.180 DELIVERY OF PREMISES AND CANCELLATION OF ABATEMENT ORDER ON PAYMENT OF COSTS AND BOND. If the owner or lessee of the premises appears and pays all costs of the proceeding, and files a bond with sureties to be approved by the clerk in such sum as the court may deem necessary, not to exceed the full value of the property to be ascertained by the court, or in vacation, by the clerk of the court, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order that the

premises which have been closed under the order of abatement be delivered to the owner or lessee and that said order of abatement be canceled so far as it may relate to said property. If the bond is given and costs therein are paid before judgment and order of abatement, the suit shall be thereby abated as to said building and owner only.

PENALTIES

465.990 PENALTIES. A party found guilty of contempt under ORS 465.160 or a person violating subsection (2) of ORS 465.150 shall be punished by a fine of not more than $1,000 or by imprisonment in the county jail for not more than six months, or by both.